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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 685

RAYMOND A. BELZ,

Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, HARRY C. SCHAACK, RICHARD F. UHLMANN, J. O. McCLINTOCK, EARLE M. COMBS, JR., G. WILLARD HALES, SYLVESTER J. MEYERS, FRANK A. MILLER, THOMAS E. HOSTY, CARL E. BOSTROM, J. HOLLIS GRIFFIN, LACY J. LEE, CLARENCE W. ELMER, JOHN S. MORRIS, GEORGE W. ALTORFER, ALBERT C. FISCHER, HOMER P. HARGRAVE, JOHN R. MURRAY and LEE H. WAGNER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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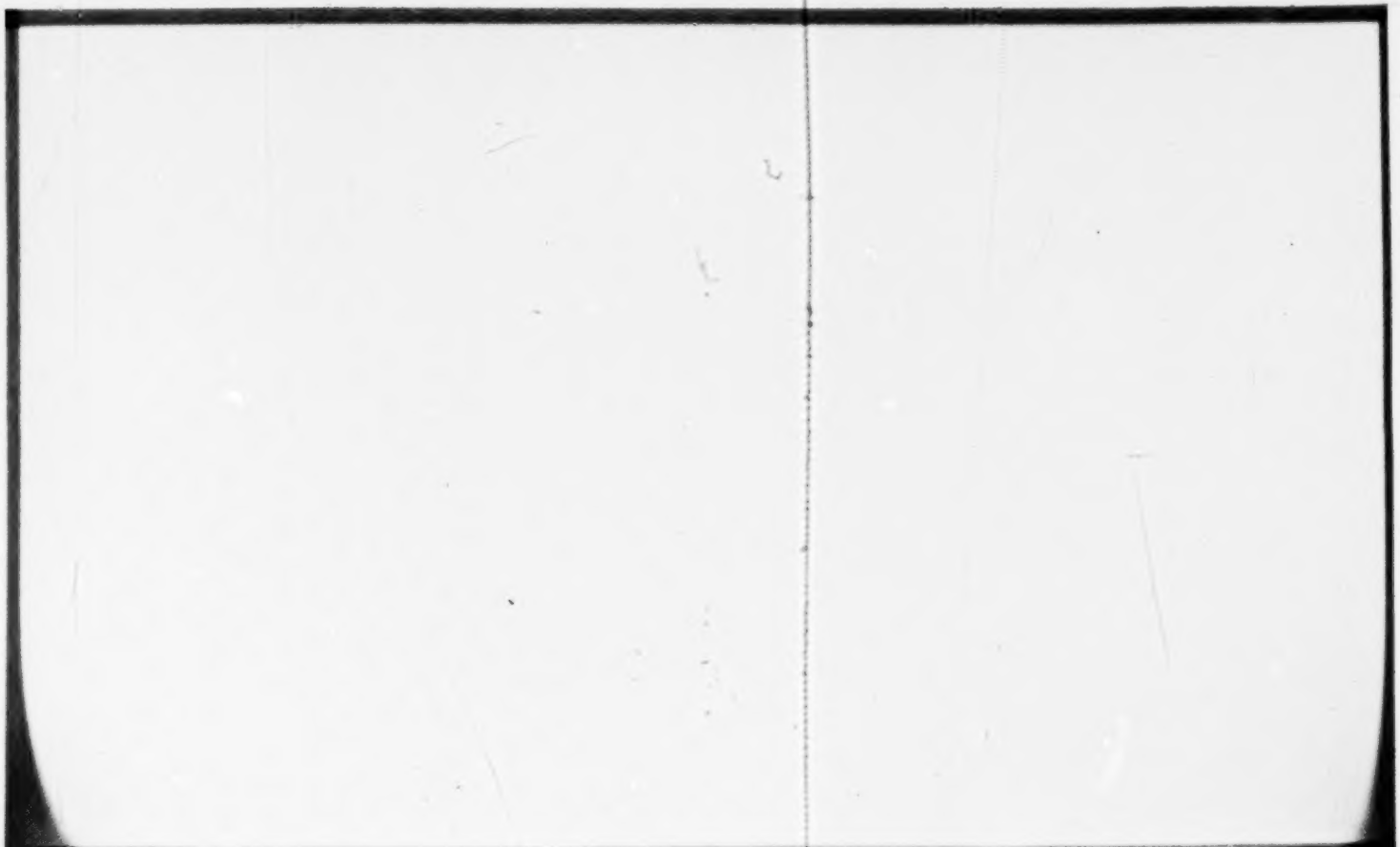

INDEX.

PAGE

Petition for writ of certiorari 1-17
OPINIONS Below 2
Statement 2-8
Analysis of opinion below 8-9
Jurisdiction 9
Statutes involved 9-10
Specifications of Errors to be urged 10-11
Questions presented 11-12
Reasons relied on for allowance of Writ 13-15
I. The Circuit Court of Appeals Has Denied Important Questions of Federal Anti-Trust Law in a Way in Conflict With the Applicable Decisions of This Court 13-14
A. Respondents' conduct in enacting Regulation 1899 constituted "price fixing" per se 13
B. Respondents' conduct in enacting Regulation 1899 constituted an unreasonable restraint of trade 13-14
C. Respondents' conduct in enacting Regulation 1899 was in violation of the anti-monopoly provisions of the Sherman Act 14
II. The Circuit Court of Appeals Decided Important Questions of Federal Law Which Have Not Been, and Which Should Be Decided By This Court .. 14-15
A. Respondents' conduct in enacting Regulation 1899 was in violation of Section 9 of the Commodity Exchange Act 14
B. The decision of the Circuit Court of Appeals permitting the delegation of power to a private agency to control interstate commerce by its rules and regulations is a delegation of power prohibited by Schechter vs. U. S., 295 U. S. 495 15
National Importance of Federal Questions Involved .. 15-16

Prayer 17
Brief in Support of Petition for Certiorari 18-31
Preliminary 18
Summary of Argument 18
ARGUMENT 19-31
I. Regulation 1899 or Price Fixing per se ...19-23
II. Regulation 1899 as unreasonable restraint of trade 23-26
III. Regulation 1899 as exercise of monopoly power 26
IV. Regulation 1899 as violation of Sect. 9 of Commodity Exchange Act 27
V. Unlawful delegation to Chicago Board of Trade of power to regulate interstate commerce 28
VI. Abuse of Fiduciary Allegations 28, 29
VII. Authority of Daniel vs. Bd. Trade on question of respondents' financial interests 29
VIII. Right to Declaratory Relief 30
Conclusion 31

TABLE OF CASES CITED.

Addyson Pipe Co. vs. U. S., 175 U. S. 211, 242 (1899).. 28
Aetna Life Ins. vs. Haworth, 300 U. S. 227, 240..... 30
American Tobacco Co. vs. U. S., 328 U. S. 781, 809 (1946) 14, 26
Anderson vs. Shipowners' Ass'n., 272 U. S. 359, 365 (1926) 14, 24, 26
Appalachian Coals vs. U. S., 288 U. S. 344, 360 (1933). 19
Associated Press vs. U. S., 326 U. S. 1, 12, 14, 19 (1945) 14, 24
Board of Trade vs. Christie, 198 U. S. 236, 249 (1905).. 3
Board of Trade vs. Olsen, 262 U. S. 1, 39-40 (1923)...15, 26
Board of Trade vs. U. S., 246 U. S. 231, 238, 239, 240 (1918) 14, 15, 16, 19, 23, 24, 26
Cargill vs. Board of Trade, 164 F. 2d 820 (CCA, 7, 1947) 2, 8, 23, 28
Daniel vs. Bd. of Trade, 164 F. 2d 815, 820 (CCA, 7, 1947) 11, 28, 29

Fashion Guild vs. Fed. Trade Comm., 312 U. S. 457, 465 (1941) 14, 25, 28
Meadowmoor Dairies vs. Drivers' Union, 371 Ill. 377, 381 (1939) 27
Meredith vs. Winter Haven, 320 U. S. 228, 234..... 30
Northern Securities Co. vs. U. S., 193 U. S. 197, 351-352 (1904) 25
Parker vs. Brown, 317 U. S. 341, 357, 363 (1943) 19
Rice vs. Bd. of Trade, 331 U. S. 247, 253 (1947) 15, 28
Schechter vs. U. S., 295 U. S. 495, 537 (1935) 12, 15, 28
Texas Ry. vs. Ry. Clerks, 281 U. S. 548, 569-570 (1930) 27
U. S. vs. Aluminum Co., 148 F. 2d 416 (CCA, 2, 1947). 14
U. S. vs. Line Material Co., No. 8 Oct. Term 1947, (March 8, 1948) 24
U. S. vs. Masonite Corp., 316 U. S. 265, 274, 276, 281 (1942) 13, 22
U. S. vs. Patten, 226 U. S. 525, 542 (1913) 14, 25
U. S. vs. Socony-Vacuum Oil Co., 105 F. 2d 809, 821, 823 (CCA, 7, 1939) 22
U. S. vs. Socony-Vacuum Oil Co., 301 U. S. 150, 217, 218, 220-224 (1940) 13, 15, 21, 22, 23, 27
U. S. vs. Trenton Potteries, 73 U. S. 392, 397-398 (1927) 13, 22, 23
U. S. vs. Underwriters' Ass'n., 322 U. S. 533, 535, 554, 556 (1944) 13, 22, 23, 25

TEXTS ARTICLES AND REPORTS.

28 Calif. L. Rev. 297 22
Commodity Exchange Authority Report:
"Affect on Future Trading In Grains of changes of Price Ceilings of May 13, 1946 (Aug. 12, 1946)... 19
Fed. Trade Comm. Report On Grain Trade:
"Effects of Future Trading", Vol. VII (1926), pp. 240, 270 3

Fed. Trade Comm. Report:
"Economic Affects of Grain Exchange Actions Affecting Futures Trading During First Six Months of 1946" (Feb. 2, 1947) 19, 25, 29

2 Scott:
"Trusts" Sect. 170.11 (1939) 29

TABLE OF STATUTES CITED.

Clayton Act:
Sect. 4 (15 U.S.C. Sect. 15) 10

Commodity Exchange Act:
Sect. 4a (7 U.S.C. Sect. 6a) 3
Sect. 9 (7 U.S.C. Sect. 13) 10, 14, 27

Declaratory Judgment Act:
28 U. S. C. Sect. 400 .....10, 30

Judicial Code:
Sect. 249a, (28 U.S.C. Sect. 347, a) 9
Sect. 274 d, (28 U. S. Sect. 400) 30

Sherman Act:
Sect. 1 (15 U.S.C. Sect. 1) 9
Sect. 2 (15 U.S.C. Sect. 2) 9

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Raymond A. Belz, petitioner, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit (R. 35), which affirmed a judgment order of the United States District Court for the Northern District of

Illinois, Eastern Division (R. 16) sustaining respondents' motion (R. 8) to dismiss the action for failure of the complaint to state a claim upon which relief could be granted.

OPINIONS BELOW.

The memorandum opinion of the Circuit Court of Appeals, reported in 164 F. 2d 824, affirmed the District Court judgment on authority of the opinion filed the same day in the case of *Cargill, Incorporated* v. *Board of Trade of the City of Chicago, et al.* (now pending in this court on petition for certiorari, No. 671, October Term, 1947). The *Cargill* opinion is reported in 164 F. 2d 820.

The memorandum opinion of the District Court (R. 13), incorporated the memorandum opinion filed by said court in the same *Cargill* case. This memorandum opinion is not reported.

STATEMENT.

The action is for money damages and for a declaration of rights (R. 7). The jurisdiction of the District Court was based on, and the action arose under, the Sherman Act (15 U.S.C. §§ 1-7); the Clayton Act (15 U.S.C. §§ 12-27); the Commodity Exchange Act, (7 U.S.C. §§ 1-17a) (R. 3), and further on diversity of citizenship in a claim where money damages in excess of $3000 was sought against respondents for breach of fiduciary duties. The action also was based on the Federal Declaratory Judgment Act (28 U.S.C. § 400).

The ultimate facts as set forth in the complaint and which must be taken as admitted by the motion to dismiss, are as follows:

Petitioner is a citizen and resident of the State of Iowa. All individual respondents are citizens and residents of

Illinois. Respondent, Board of Trade of the City of Chicago, hereinafter referred to as the "Board", is an Illinois corporation, resident in Chicago, Illinois. All individual respondents were members and some were officers of the Board of Directors of the Board. The matter in controversy exceeds the sum of Three Thousand Dollars exclusive of interest and costs (R. 3).

For several years prior to January 7, 1946, Max Belz, petitioner's predecessor in the grain business was engaged in business in Iowa, carrying on a grain business in interstate commerce under the trade name of Holland Grain Company.

Sometime prior to November 8, 1945, Max Belz had entered into a contract for the sale of seventy-five thousand bushels of cash corn (R. 3) in Interstate Commerce, with delivery under this contract being deferred to September, 1946 (R. 4).

On or about November 8, 1945, as a hedge against this contract of sale, Max Belz entered into a futures contract upon respondent Board for the purchase of 75,000 bushels of corn in interstate commerce, this futures contract calling for delivery to Belz in September, 1946, at a price of $1.18\frac{1}{2}$ per bushel (R. 4).

This "hedging" contract was in accordance with the usual practice of grain elevators, grain dealers, millers, etc. [This kind of "hedging" has Congressional approval in Sec. 4a of the Commodity Exchange Act (7 U.S.C. Sec. 6a); and the recognized social and economic desirability of such "hedging" is commented on in *Bd. Trade* v. *Christie*, 198 U. S. 236, 249 (1905) and discussed in Report of the Federal Trade Commission on The Grain Trade: "Effects of Future Trading" Vol. VII, (1926) at pp. 240, 270.] The petitioner and his predecessor in interest in the

grain business were following the usual trade practice in employing a "hedge" as "price insurance." Under such practice petitioner's "hedge" was a typical example: petitioner or his predecessor as a grain dealer had entered into a so-called cash grain transaction, calling for the actual deferred delivery of grain. When a sale of cash grain was thus made, in order to insure against loss which might arise from fluctuations in the price of grain, petitioner and his predecessor in interest engaged in "hedging". This was accomplished by purchasing on respondent Board the same quantity and kind of grain under a so-called "futures contract". In entering these hedging agreements, petitioner and his predecessor in interest relied upon the integrity, validity and enforceability of such futures contracts made on respondent Board (R. 3).

The Board conducted a grain exchange in interstate commerce, and was designated a "contract market", in accordance with the provisions of the Commodity Exchange Act. Over ninety percent of the trading in grain futures contracts in the United States is conducted on said Board.

According to the rules and regulations of the Board, either party to a futures contract made on respondent Board may at any time prior to the seventh business day before the end of the delivery month, dispose of the futures contract at the current market price thereof on the respondent Board by making an offsetting sale or an offsetting purchase; the seller under a futures contract may deliver the actual commodity at any time during the delivery month to a buyer who has not previously offset his purchase by sale. If the seller under a futures contract has not so offset his sale by a purchase under a futures contract, he must deliver the commodity on or before the last business day of the delivery month to a buyer under a

futures contract who has not so offset his purchase by sale (R. 4).

Respondent Board's by-laws contained a rule unknown to petitioner, and his assignor, Max Belz, which provided as follows:

> "251. Emergencies.—The Board shall have power to declare any day to be a holiday or to close the Exchange or to stop trading in any security or in any of the future contracts of any commodity, by reason of any emergency or otherwise, and to make such Regulations in regard to deliveries and settlement prices as it may deem proper because thereof. All Exchange contracts shall be subject to the exercise of such power. Such contracts shall also be subject to the exercise by the Clearing House of the powers reserved to the Clearing House by its Charter, By-Laws, and Resolution." (R. 4)

On June 13, 1946, petitioner's futures contract calling for delivery to him in September, 1946 of seventy-five thousand bushels of corn at the price of $1.18¼ per bushel was in full force and effect. At that time the cash corn contract calling for sale by the petitioner of the same amount of corn was also in full force and effect. (R. 4)

On about June 13, 1946, the respondents in the furtherance of their own financial interests (R. 4) and in disregard of the rights of buyers under grain futures contracts, combined, conspired and agreed among themselves arbitrarily and unreasonably to fix, manipulate, and control the price of, and to prevent dealing in, a substantial part of the grain futures contracts in interstate commerce, including petitioner's futures contract, all of which was in unreasonable restraint of interstate trade in commerce. (R. 5) As a part of such combination, conspiracy and agreement, and in furtherance thereof, the individual respondents as the Board of Directors of respondent Board, on June 13, 1946,

purporting to act under Rule 251 of the Board, adopted the following regulation known as Regulation 1899, (R. 5-6) which has not since been repealed or modified:

The Regulation made certain recitals as follows:

The existence of an acute and critical world food shortage which it is anticipated will continue throughout 1946 and will necessitate the continued export from the United States of whole grains and grain products in unusually large quantities; that the purchase and allocation of various grains by the United States under its programs for world famine relief has already diverted and will continue to divert from domestic trade channels large quantities of grain that other wise would be available for millers and other processors and for the performance of grain futures contracts on this Exchange; that in consequence of the foregoing and in view of present crop and statistical data considered in connection with reported grain stocks and added demands of governmental agencies, the supply of wheat, corn, barley, and rye for domestic use and consumption will be so inadequate as to: (1), render impossible the continuance of this Exchange of a free, open and orderly market where normal competitive elements can and may operate, with respect to futures contracts calling for delivery of wheat in July, August, September, November, and December, 1946, and in March and May, 1947, for delivery of corn in July and September, 1946, for delivery of barley in July and September, 1946, and for delivery of rye in July, September, November, and December, 1946, and in March, 1947; (2), prevent the performance and fulfillment of such futures contracts by delivery of requisite quantities of such grains; and (3), enable purchasers under such futures contracts, in the event of the raising or removal of governmental price ceilings, to require liquidation of such futures contracts at exorbitant and extortionate prices; that the action hereinafter ordered is required in the national public interest, and that an emergency exists, within the meaning of Rule 251." (R. 5-6)

After the recitals the Directors acting under Rule 251 ordered:

1. That forthwith this [illegible]e 13, 1946, all trading be stopped in: (a) Futures co[illegible] calling for delivery of

wheat in July 1946, in August 1946, in September 1946, in November 1946, in December 1946, in March 1947, and in May 1947; (b) Futures contracts calling for delivery of corn in July 1946 and in September 1946; (c) Futures contracts calling for delivery of barley in July 1946 and in September 1946; (d) Futures contracts calling for delivery of rye in July 1946, in September 1946, in November 1946, in December 1946, and in March 1947; and that there shall be no further trading in any of such futures contracts;

2. That all of the aforesaid futures contracts outstanding at the close of trading therein this day, June 13, 1946, shall be settled without delivery and by payment and acceptance of settlement prices, which shall be the closing price quotations of each of said futures on this Exchange on this day, and

3. That the Clearing Corporation shall proceed to settle with its members at such closing price quotations, and that all members of this Exchange proceed to make such adjustment on all of the aforesaid futures contracts." (R. 6)

Subsequently, respondents put said Regulation 1899 into effect. The result was that the seller under petitioner's futures contract offered to pay petitioner per bushel only the difference between $1.18\frac{1}{2}$ (the contract price) and $1.46\frac{1}{2}$ (the June 13, 1946, closing price on respondent Board). After June 13, 1946, the market price of petitioner's futures contract would have risen with the rise in the market price of corn. Subsequently when the market price of corn advanced as hereinafter mentioned, petitioner was deprived of the benefit of the subsequent rise which would have occurred in the market price of his said futures contract. (R. 7)

After June 30, 1946, the market price of corn rose. Corn was readily available. By July 19, 1946, petitioner had acquired sufficient corn to perform his contract for the sale of cash corn previously described. The wrongful acts of respondents complained of herein deprived the petitioner of his rights under the futures contract, for on July 19,

1946, the market price of September, 1946 corn would have reached $2.23 per bushel, and in the ordinary course of petitioner's business he would have disposed of his said futures contract on that date (R. 7).

During September, 1946, the market price of corn on defendant Board ranged from a high of $2.02 per bushel to a low of $1.82 per bushel. On the last business day of September, 1946, it was $1.85 per bushel (R. 7).

By reason of respondents' wrongful acts, petitioner sustained actual damages in the sum of $57,375.00. Petitioner prayed for Judgment declaring said Regulation 1899 illegal, void and unenforceable; a judgment against respondents jointly and severally for actual and triple damages; and attorney's fees; and for general relief. (R. 7)

Respondents' motion in substance claimed that the complaint failed to state a claim upon which relief could be granted giving specific reason therefor (R. 8).

ANALYSIS OF OPINION BELOW.

The trial court ruled in substance that there was price fixing by the Board's rules and regulations but that such price fixing was legally justified (R. 14), and that the petitioner was bound by the contract embodying the rules and regulations (R. 15).

The reasoning of the Circuit Court of Appeals in the Cargill opinion, 164 F. 2d 820, was in substance, that:

1) The regulations and rules of the Board are binding upon traders. 2) The plaintiff did not ask for a determination of the validity or invalidity of the rules or regulations. 3) Termination of trade in certain futures contracts and the liquidation thereof is not price fixing but is establishment of a measure of damages for liquidation of the termi-

nated contracts, and in which there is to be no further trading. 4) Termination and settlement of contractual obligations by mutual agreements of the parties is not price fixing. 5) The termination and settlement of the futures contracts were reasonable restraints, which were not illegal because they were in aid of commerce in facilitating future trading on the market. 6) The respondents can be liable only if they exercise bad faith in passing emergency rules and regulations such as involved in the instant case. 7) Plaintiff failed to cite a decision showing that the conduct of respondents constituted price fixing.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on December 23, 1947 (R. 34). Petitioner's petition for rehearing was filed on December 31, 1947 (R. 37), and denied on January 9, 1948 (R. 45). Jurisdiction is invoked under § 249(a) of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, § 1; 43 Stat. 938, 28 U.S.C. § 347(a). This petition for writ of certiorari is timely, within the requirements of the Act of February 13, 1925, Chap. 229, § 8; 43 Stat. 940, 28 U.S.C. § 350.

STATUTES INVOLVED.

Section 1 of the Sherman Act:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *" (15 U.S.C., § 1.)

Section 2 of the Sherman Act:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce * * *" (15 U. S. C. § 2).

Section 4 of the Clayton Act:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U.S.C., § 15).

Section 9 of the Commodity Exchange Act, providing it is unlawful to:

> "* * * manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for the future delivery on or subject to the rules of any board of trade * * *" (7 U.S.C. § 13).

The Declaratory Judgment Act provides:

> "(1) In cases of actual controversy * * * the courts of the United States shall have power upon * * * complaint, * * * to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed * * *." (28 U.S.C. § 400)

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1) In holding that the complaint failed to state a cause of action under the Sherman Act.

2) In holding that the complaint failed to show that respondents had entered into an agreement to fix prices as to futures contracts in grains.

3) In holding that the complaint failed to show that respondents had violated the Sherman Act by entering into an agreement in an unreasonable restraint of trade.

4) In failing to pass upon petitioner's contentions that respondents' conduct violated the Sherman Act: (a) in restricting and prohibiting free trade and competition; (b) in actively dominating a commerce over which they had monopolistic control, and (c) in violating the Commodity Exchange Act by manipulating prices on a contract market and (d) that respondents' conduct was tortious in that it violated their fiduciary obligations.

5) In holding that the allegations of the complaint in this case parallel the allegations of the *Cargill* case.

6) In holding that the complaint failed to allege facts entitling petitioner to relief under the Federal Declaratory Judgment Act.

7) In failing to hold that the decision in the companion case *Daniel* v. *Board of Trade,* 164 F. 2d 815, governed the disposition of the instant case rather than did the *Cargill* case.

8) In affirming the judgment of the District Court dismissing the action.

QUESTIONS PRESENTED.

Considering the allegations of the complaint as a matter of law and not as a matter of disputed fact, the following questions arise under the decision and opinion of the Circuit Court of Appeals:

1) Did the conduct of respondents on June 13, 1946 in enacting Regulation 1899 in substance providing for the liquidation and determination of all futures contracts in certain grains calling for delivery of grains in certain months commencing July, 1946 and terminating in May, 1947, including petitioner's future contract calling for delivery of 75,000 bushels of corn in September, 1946 at a price of $1.18\frac{1}{2}$ per bushel, and further fixing the price at

which such future contract should be settled as the closing price quotation of that future contract on the Board as of June 13, 1946, constitute the fixing of prices on the commodity of futures contracts prohibited by the Sherman Act?

2) Did such conduct described in question 1 constitute an unreasonable restraint of trade within the meaning of the Sherman Act?

3) Did such conduct described in question 1 constitute a violation of the monopoly provisions of the Sherman Act?

4) Did such conduct described in question 1 constitute a violation of the anti-manipulation provisions of the Commodity Exchange Act?

5) Does the decision of the Circuit Court of Appeals approve delegation of Congressional power to a private agency in violation of *Schechter* v. *United States,* 295 U. S. 495?

6) Did such conduct described in question 1 constitute a breach of fiduciary duty by the Directors of the Board toward traders?

7) Under the allegations of the complaint, especially paragraph eleven thereof, did the conduct of the respondents in furtherance of their own financial interests constitute the fraud sufficient to base a cause of action against the individual directors under the reasoning of the companion case of *Daniels* v. *Board of Trade?*

8) Was the petitioner entitled to a declaration of his rights or of respondents' obligations under the Federal Declaratory Judgment Act?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The Circuit Court of Appeals has decided important questions of federal anti-trust law in a way in conflict with the applicable decisions of this court.

1) The decision of the Circuit Court of Appeals to the effect that the action of a private agency, which by its regulations, eliminates trading in grain futures contracts and dispenses with the delivery of the grain under such contracts and further fixes the prices at which these contracts are terminated (*i. e.*, performed) at a price prevailing long in advance of the performance dates of the futures contracts, does not constitute price fixing *per se* is squarely in conflict with and is contrary to the decisions of this court in:

U. S. v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 217, 218, 220-224 (1940).

U. S. v. *Trenton Potteries Co.*, 273 U. S. 392, 397-398 (1927).

U. S. v. *Masonite Corp.*, 316 U. S. 265, 274, 276, 281 (1942).

U. S. v. *Underwriters' Assn.*, 322 U. S. 533, 535, 554, 556 (1944).

2) The decision of the Circuit Court of Appeals that the admitted restraint of commerce caused by the regulations adopted by a private agency, which eliminated trading in grain futures contracts, dispensed with the delivery of the grain under such contracts, and fixed the prices at which the contracts were terminated at a price prevailing

long in advance of the performance dates of the futures contract was not a violation of the Sherman Act because it was a reasonable restraint is squarely in conflict with and is contrary to the decisions of this Court in:

Associated Press v. *U. S.*, 326 U. S. 1, 12, 14, 19 (1945).

Chicago Board of Trade v. *U. S.*, 246 U. S. 231, 238 (1918).

Anderson v. *Shipowner's Assn.*, 272 U. S. 359, 365 (1926).

U. S. v. *Patten*, 226 U. S. 525, 542 (1913).

Fashion Guild v. *Federal Trade Commission*, 312 U. S. 457, 465 (1941).

3) The failure of the Circuit Court of Appeals to pass upon petitioner's contention that the conduct of the respondents was in violation of the Sherman Act in that they actively dominated commerce over which they had monopolistic control was in conflict with and failed to adhere to the decision of this court in *American Tobacco Co.* v. *U. S.*, 328 U. S. 781, 809 (1946); cf. *U. S.* v. *Aluminum Co.*, 148 F. 2d 416 (C.C.A. 2, 1947).

II.

The Circuit Court of Appeals has decided important questions of federal law which have not been, and which should be, settled by this court.

1) The failure of the Circuit Court of Appeals to hold that the respondents' conduct was a manipulation of prices within the prohibition of Section 9 of the Commodity Exchange Act is in conflict with that statute [7 U.S.C. Sec. 13] and with the decisions of this court in:

Rice v. *Chicago Board of Trade,* 331 U. S. 247, 253 (1947).

Board of Trade v. *U. S.,* 246 U. S. 231, 238, 240 (1918).

Board of Trade v. *Olsen,* 262 U. S. 1, 39-40 (1923).

Cf. *U. S.* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 223 (1940).

2) The holding of the Circuit Court of Appeals is to the effect that the Chicago Board of Trade has been exempted from the Sherman Act so that by rules and regulations that private agency may fix, manipulate and control the prices of grain futures contracts and is in direct conflict with the prohibition against delegation of Congressional authority as formulated by this Court in *Schechter* v. *U. S.* 295 U. S. 495, 537 (1935).

NATIONAL IMPORTANCE OF FEDERAL QUESTIONS PRESENTED HEREIN.

The decision by the Circuit Court of Appeals creates several federal problems of vital national importance involving the construction and application of the Federal Anti-Trust Laws:

1) Are commodity exchanges throughout the United States so exempt from the Federal Anti-Trust Laws that the Directors of the exchange may agree upon and fix prices for futures contracts by means of the adoption of a regulation grounded upon a claim that the liquidation of the futures contracts and the determination of the present price at which such contract shall be liquidated (*i. e.,* performed), is necessary as a matter of economic justification?

2) May any national industry, following the reasoning of the Circuit Court of Appeals, create a cooperative trade

association or to establish an exchange, provide for dealing in "executory" contracts of the commodities of such industry, and by rules and regulations analogous to that of the Board similarly agree upon and fix the prices of such commodities under the claim of economic necessity or under any other claimed economic justification?

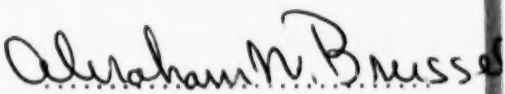
3) May any regulated industry escape from compliance with the Sherman Act by adoption of rules and regulations analogous to those relied upon by respondents in the case at bar?

The Circuit Court of Appeals, without adequately investigating the nature of the rule, the scope of the rule, the effects of the rule (cf. the requirements laid down by Justice Brandeis in *Chicago Board of Trade* v. *U. S.*, 246 U. S. 231 (1918) at pp. 239-240) has virtually decided that the hedges of a country grain dealer, entered into as a protection against price fluctuations, may be eliminated by the Board of Directors of the Chicago Board of Trade at anytime when in their opinion there is economic justification so to do. The practical effect of this decision is to make the Board of Directors of the Chicago Board of Trade the National Legislature in regulating prices not only of the commodity of a grain future contract, but also of the *very* grains which are the subject matter of the futures contracts. Our entire national economy is directly affected by a decision permitting the concentration of such vast national economic power in the hands of a private agency.

PRAYER.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued by this Honorable Court, to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit.

RAYMOND A. BELZ, *Petitioner,*
By ABRAHAM W. BRUSSELL,
Attorney for Petitioner.



HARVEY UHLENHOPP,
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CARL DEVOE,
ABRAHAM W. BRUSSELL,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Preliminary.

To avoid repetition, petitioner adopts references to opinion of court below, Jurisdiction, Date of Judgement, Statement and Specification of Errors as set out in Petition, *supra*, at pp. 1-11.

SUMMARY OF ARGUMENT.

I. Regulation 1899 considered in its economic setting constituted price fixing per se.

II. Regulation 1899 considered in its economic setting constituted an unreasonable restraint of trade.

III. Regulation 1899 was an exercise by respondents of their monopoly power over grain futures contracts for the purpose of preventing competition.

IV. Respondents violated Section 9 of the Commodity Exchange Act by manipulating prices on a contract market.

V. Under the decision of the Circuit Court of Appeals the Chicago Board of Trade is permitted to continue as an extra-governmental agency with power to prescribe rules for the regulation and restraint of interstate commerce in grains.

VI. Respondents abused their position as fiduciaries.

VII. The Circuit Court of Appeals erred in failing to follow the ruling of the companion case, Daniel v. Bd. of Trade, 164 F. 2d 815.

VIII. Petitioner was entitled to a declaration of his rights or the respondents' obligations.

ARGUMENT.

I.

Regulation 1899 considered in its economic setting constituted price fixing per se.

The determination of every anti-trust problem requires the consideration of the particular facts in the setting of the trade or industry involved, and a further understanding of the part that the trade or industry plays in our national economy. *Board of Trade* v. *U. S.*, 246 U. S. 231, 238 (1918); *Appalachian Coals* v. *U. S.*, 288 U. S. 344, 360 (1933).

So considered, the facts before this court must be considered in their economic setting in order to understand their national significance. Two Federal agencies have made a careful study of the economic facts involved in the actions of the Chicago Board of Trade pertaining to grain futures contracts in the spring and early summer of 1946; first, Commodity Exchange Authority Report entitled "Effect On Future Trading In Grains of Changes in Price Ceilings of May 13, 1946" (published August 12, 1946); second, Federal Trade Commission Report entitled "Economic Effects of Grain Exchange Actions, Affecting Futures Trading During First Six Months of 1946" (published February 4, 1947).

This court may and will take judicial notice of these reports. *Parker* v. *Brown*, 317 U. S. 341, 357, 363 (1943).

The complaint alleged (R. 4-5) and the motion to strike admitted that the respondents fixed, manipulated and controlled the prices of grain futures contracts by the enact-

ment of Regulation 1899. In considering these facts attention must be given to the economic effect of Regulation 1899. The economic effect of Regulation 1899 was immediate and devastating! The impact of Regulation 1899 and similar previous regulations is clearly portrayed by Table 8, Fed. Trade Comm. Report (1947), *supra*, at p. 41 showing that on June 13, 1946 there were 29 million bushels of grain futures closed out and on May 13, 1946 there were 84 million so closed out. As a matter of economics, removing such a large amount of futures contracts from the market must have affected everyone dealing with grains, whether engaged in the raising, selling, handling, processing, milling of grain or in hedging, speculating or trading in any form of grain or grain futures contracts. Every phase of the grain trade was affected. One phase of the economic effects was the impact on prices—both of the actual grain and the futures contracts. Consider the effect on petitioner: petitioner's hedge, i. e., price insurance, for 75,000 bushels of September 1946 corn was gone. The price of corn rose and fluctuated between June 13, 1946 and September 30, 1946. Petitioner who needed corn to fulfill his contract of sale, had been deprived of his price insurance, his hedge, by the action of respondents. Petitioner would have to buy other corn at the higher price in order to fulfill his contract.

If petitioner would have to buy other corn, all other persons in the market would be affected. Again, grain prices were affected. Grain prices rose or fell in a manner different than they would have fluctuated had not the futures contracts been eliminated from the economic picture by respondents' action.

The same results followed in every instance where a hedging contract had been entered into by the purchase of a "grain future".

Both the demand and supply for grain was affected and changed by the voluntary action of respondents. The respondents' beliefs as to economic desirability did not prevent Regulation 1899 from bringing about an intended result so far as prices are concerned—both of the grain futures contracts and also as to the grains.

The sellers of grain futures contracts, i. e. the shorts, were in fact relieved by Regulation 1899 from a heavy burden because the price of grain went up. The repeal of O. P. A.—anticipated by the respondents on June 13, 1946—removed the price ceilings. The shorts, by the enactment of Regulation 1899, were enabled to avoid losses that would have followed if they had been held to the terms of their short sales on futures contracts.

The vast power of respondents to "manipulate" may not be limited to helping "shorts" avoid losses. If the international and national economic facts had been different, i. e., if unexpected phenomenal grain supplies had poured into the markets from every corner of the globe, Regulation 1899 would have served to financially benefit the "longs" on grain futures contracts instead of benefiting the sellers or "shorts". But, can it be denied that the Directors of the Board affected, i. e. manipulated prices?

The economic facts show that the essence of Regulation 1899 was the evil of price fixing as defined by this court. The specific "machinery" employed by the respondents for "price fixing" is immaterial; the test is the *economic* effect, i. e. curtailment of competition, direct interference and reduction of the play of the forces of supply and demand. *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 at 220. Direct interference with "the free play of market forces" is "beyond the pale". (310 U. S. at 221).

Regulation 1899 was a voluntary choice designed to "determine" prices in preference to permitting prices to

be set by free competition, and as such was an unlawful "tampering with price structures" (310 U. S. at 221).

If "stabilization" were the sole purpose of Regulation 1899, it would still be price fixing. Such market "manipulation" was an artificial stimulus applied to market prices and by "distortion"—prevented the determination of those prices by free competition alone (310 U. S. at 223).

In *U. S.* v. *Trenton Potteries*, 273 U. S. 392 (1927), price fixing agreements were held to be violative of the Sherman Act *per se* because of the "elimination of one form of competition" (273 U. S. at 397). In *U. S.* v. *Masonite Co.*, 316 U. S. 265 (1942) the device of a *del credere* agency coupled with a patent monopoly was not saved from violating the Sherman Act, notwithstanding the tendency to *promote* competition between dealers (316 U. S. at 276). In *U. S.* v. *Underwriter's Assn.*, 322 U. S. 533 (1944) this court held that if competition were restrained by combinations fixing insurance rates the violation of the Sherman Act was established; and if exceptions were to be written into the Sherman Act they must come from Congress and not from this Court (322 U. S. at 561). And all the economic evils condemned by these cases flowed from the enactment of Regulation 1899.

The error of the Circuit Court of Appeals in coming to the conclusion that Regulation 1899 was not price fixing (164 F. 2d at 823) notwithstanding its recognition that trading on the futures contracts was stopped was due to its failure to recognize that the effect upon competition is the true test of "price-fixing". The form of the device or the machinery are irrelevant. In substance this error repeated the "economic" error committed by the court in *U. S.* v. *Socony-Vacuum Oil*, 105 F. 2d 809, 821, 823 (1939) which was reversed in 310 U. S. 150 (1940). See comment in 28 Calif. Law Rev. at p. 297. The curtailment of competition

brought about by the "artificial stimuli" distorting the prices established by free competition is the price-fixing condemned by the Sherman Act.

Since Regulation 1899 was aimed at "price" and since it had an appreciable effect on general market prices (310 U. S. at 217) it was invalid *per se* under *Board of Trade* v. *U. S.*, 246 U. S. 231 (1918) as interpreted by this court in *U. S.* v. *Socony-Vacuum Oil*, 310 U. S. 150. Cf. *U. S.* v. *Trenton Potteries*, 273 U. S. 392 at 401 (1927).

Regulation 1899 affected the price structure of grains and therefore directly affected our national economy. The recitals of economic justification or the avoidance of economic catastrophe do not change the fact that Regulation 1899 was tampering with the price structure (*U. S.* v. *Underwriter's Assn.*, 322 U. S. 533 at 561-562). This was a violation of the Sherman Act *per se*.

II.

Regulation 1899 considered in its economic setting constituted an unreasonable restraint of trade.

Respondents do not deny that trade was "affected" by Regulation 1899. The complaint specifically alleged that one of the purposes of the combination was to prevent dealing in a substantial amount of grain futures contracts (R. 5). Without considering any evidence the ruling of the Circuit Court of Appeals was that as a matter of law the restraint was not illegal because the respondents' acts "were in aid of commerce" (164 F. 2d at 823). But even in the absence of any formal evidence, the economic picture outlined under I *supra* indicates the nature of the restraint. The effect upon prices of grain futures contracts, upon prices of grain, upon interference with a free market, upon

the operation of supply and demand etc., shows that Regulation 1899 was an unreasonable restraint *per se*. At the most it can not be considered as a *reasonable* restraint of trade as a matter of law.

Under *Associated Press* v. *U. S.*, 326, U. S. 1, the regulation on its face constituted the restraint of trade that violated the Sherman Act (326 U. S. at 12). It was not necessary that an actual restraint of trade be shown if the combination was unlawful (326 U. S. at 12). Since Regulation 1899 was designed to "stifle competition," it is invalid on its face (326 U. S. at 11-12). The regulation was designed to hamper or destroy competition and as such was an unreasonable restraint of trade *per se* (326 U. S. at 14).

The fact that the rules and regulations of the Board of Trade were intended to be a part of every contract entered into on the Board of Trade, would not immunize such device against running afoul of the Sherman Act (326 U. S. at 19).

Compare the language of Mr. Justice Reed in *U. S.* v. *Line Material Co.*, No. 8, term 1947 (decided March 8, 1948) to the effect that "Thus we have a statutory monopoly by the patent and by the Sherman Act a prohibition, not only of monopoly or attempt to monopolize, but of every agreement in restraint of trade."

In *Board of Trade* v. *U. S.*, 246 U. S. 231, this court recognized that a rule of the Chicago Board of Trade might have such economic consequences that it would be an unreasonable restraint of trade (246 U. S. at 238). And before arriving at the conclusion that the rule was not an unreasonable restraint of trade Justice Brandeis analyzes the nature, scope and effect of the rule in question (246 U. S. at 239-240).

In *Anderson* v. *Shipowner's Ass'n.*, 272 U. S. 359 this court held that a complaint which charged that shipowners

and operators had agreed to surrender their rights to hire seamen to the association stated a cause of action under the Sherman Act. This "restraint upon freedom to carry on interstate commerce" was not as effective as the restraints on prices, competition, etc. created by Regulation 1899.

In *U. S.* v. *Patten,* 226 U. S. 525 (1913) this court held that a corner of the cotton futures market constituted an unreasonable restraint of trade because the economic effects were to "thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition" (226 U. S. at 542). But these were the economic effects of Regulation 1899.

The regulation and restraint of interstate commerce achieved by Regulation 1899 is squarely within the condemnation of this court, in *Fashion Guild* v. *Fed. Trade Comm.*, 312 U. S. 457 of "an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.'" (312 U. S. at 465.)

The gloomy predictions of economic ruin or economic catastrophe as typified by the recitals of Regulation 1899 have not impressed this court. *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 351-352 (1904); *U. S.* v. *Underwriters' Ass'n,* 322 U. S. 533, 561 (1944).

The fact alleged in the complaint that respondents were acting for "their own financial interest" (R. 4) is borne out by the findings in the Federal Trade Comm. Report (Feb. 4, 1947) p. 35.

In any event the economic reasonableness of Regulation 1899 should not have been decided in favor of respondents on the complaint alone. *Anderson* v. *Shipowners' Ass'n.*, 272 U. S. 359.

III.

Regulation 1899 was an exercise by respondents of their monopoly power over grain futures contracts for the purpose of preventing competition.

Chicago is the leading grain market of the world. *Bd. of Trade* v. *Olsen*, 262 U. S. 1. The Chicago Board of Trade is the commercial center through which most of the trading in grain is done. *Bd. of Trade* v. *U. S.*, 246 U. S. 231, 235. Over 90% of the trading in grain futures contracts in the United States is conducted on the Board (R. 3). The respondents as directors and officers of the Board have the power to affect almost all grain futures contracts in the United States.

This vast power is a monopoly power. Cf. *American Tobacco Co.* v. *U. S.*, 328 U. S. 781, 794-795. Regulation 1899 was an exercise of this monopoly power with economic consequences upon prices, competition, etc. detailed under I, *supra*. The net result was to exclude competition, i. e., the cessation of trade in grain futures contracts. This violated Section 2 of the Sherman Act. And actual exclusion of competitors is not required under *American Tobacco Co.* v. *U. S.*, 328 U. S. 781, 809-811.

IV.

Respondents violated Section 9 of the Commodity Exchange Act by manipulating prices on a contract market.

Sect. 9 of the Commodity Exchange Act (7 U. S. C. Sect. 13) makes it unlawful to "manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any board of trade."

The respondents manipulated the prices of grain future contracts and the price of grains. Market manipulation has been characterized by this court as being "implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone." *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 223. These results flowed from the enactment of Regulation 1899. See I, *supra.*

Respondents' violation of this penal statute gave petitioner, injured thereby, a cause of action either on the ground that the violation of the penal statute was a tort; (*Texas Ry.* v. *Ry. Clerks,* 281 U. S. 548, 569-570 (1930) or because respondents had induced the seller under petitioner's future contract to breach his obligation to petitioner under the substantive law of Illinois (*Meadowmoor Dairies* v. *Drivers' Union,* 371 Ill. 377, 381 (1939).

V.

Under the decision of the Circuit Court of Appeals the Chicago Board of Trade is permitted to continue as an extra-governmental agency with power to prescribe rules for the regulation and restraint of interstate commerce in grains.

Sustaining the validity of Regulation 1899 on the ground it "aided commerce" (164 F. 2d at 823) grants the Board power to regulate interstate commerce limited only by "bad faith" (164 F. 2d at 823).

There was no such grant of power under the Commodity Exchange Act. *Rice* v. *Chicago Bd. Trade,* 331 U. S. 247, where at 253, n-4 this court pointed out that there was no attempt under that statute to endow private groups with law making functions.

Even Congress could not delegate such power to a private agency such as the Board. *Schechter Corp.* v. *U. S.,* 295 U. S. 495, 537. The ruling of the Circuit Court of Appeals erred for it "trenched" upon the power of the Congress and violated the Sherman Act.

Addystone Pipe Co. v. *U. S.,* 175 U. S. 211, 242.
Fashion Guild v. *Trade Comm.,* 312 U. S. 457., 466-467.

VI.

Respondents abused their position as fiduciaries.

Under the Illinois authorities the Directors of the Board of Trade should be considered as being in a fiduciary relationship to members and traders on the analogy of the relationship between corporate directors and stockholders. *Daniel* v. *Bd. of Trade,* 164 F. 2d 815 at 820.

The facts were that the respondents were acting in the furtherance of their own financial interest (R. 4). See also Fed. Trade Comm. Report (1947) "Economic Effects of Grain Exchange Actions Affecting Futures Trading During the First Six Months of 1946," at p. 8, showing the duality of their interests.

Preferring one class of trades, i. e., the shorts, over another class, the longs, in furtherance of their own financial interests would be grounds for equitable relief against breach of fiduciary relationship.

2 Scott: "Trusts" Sect. 170.11 (1939).

or for money damages. *Daniel* v. *Bd. of Trade,* 164 F. 2d at 820.

VII.

The Circuit Court of Appeals erred in failing to follow the ruling of the companion case, Daniel vs. Bd. of Trade, 164 F. 2d 815.

Daniel v. *Bd. of Trade,* 164 F. 2d 815 was decided by the Circuit Court of Appeals the same day as the *Cargill* and *Belz* cases. In the *Daniel* case the same court held that if the officers and directors of the Board "did not act in good faith but acted to further their own selfish interests" they would be liable for breach of their fidelity to their trust. 164 F. 2d at 820. Accordingly the cause was remanded for trial.

In our case the facts are that the respondent acted "in furtherance of their own financial interests" (R. 4). This fact served to put this case in the same category as the *Daniel* case.

VIII.

Petitioner was entitled to a declaration of his rights or the respondent's obligations.

Under the Federal Declaratory Judgment Act, Judicial Code Sect. 274d, (28 U. S. C. Sect. 400) petitioner was entitled to a declaration of his rights or of respondents' obligations.

Aetna Life Ins. Co. v. *Haworth,* 300 U. S. 227, 240.

This requested declaration pertained to every feature of the case.

Even though it be taken that the rulings of the two courts below passed on some of the questions raised by the complaint the petitioner was entitled to a declaration of his rights or of the respondents' obligations on the questions not passed upon.

Meredith v. *Winter Haven,* 320 U. S. 228, 234.

Conclusion.

The Circuit Court of Appeals decision and its implications directly concern the national welfare. The Court has erroneously made exceptions to the Sherman Act that trench upon the Congressional power.

Wherefore it is respectfully prayed that a writ of certiorari should be granted herein and this court should review the decision of the Circuit Court of Appeals and finally reverse it.

Respectfully submitted,

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Raymond A. Belz.

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OPPOSITION

BRIEF

INDEX.

	PAGE
Opinions below	1
Statement	2
Argument	6
I. The decision of the Circuit Court of Appeals in this case does not conflict with applicable decisions of this Court, but accords with the decisions of this Court, of other Federal courts and of State courts	6
A. That part of Regulation 1899 which provided for the termination and settlement of existing futures contracts without delivery and upon a monetary basis, did not constitute price-fixing	9
B. The restraint of trade, if any, imposed by Regulation 1899 was reasonable	11
C. The enforcement of Regulation 1899 was not a monopolization of trade or commerce	13
II. The decision of the Circuit Court of Appeals in this case did not decide an important question of Federal law which has not been, but which should be, settled by this Court	14
Conclusion	17

TABLE OF CASES.

American Tobacco Co. v. United States (1946), 328 U. S. 781	13
Blackman v. Stone (1939), 101 F. 2d 500	16
Cargill v. Board of Trade of the City of Chicago, CEA Docket No. 6	15
Cargill, Incorporated v. The Board of Trade of the City of Chicago, et al. (1947), 164 F. 2d 820	2, 4

Chicago Board of Trade v. United States (1918), 246 U. S. 231 ..... 7, 8, 12

Crowley v. Commodity Exchange (1944), 141 F. 2d 182 ..... 3, 7, 9, 10, 13

Daniel v. Board of Trade of the City of Chicago, et al. (1947), 164 F. 2d 815 ..... 3, 7, 9, 10, 13

Davis v. State Bank of Woodstock (1945), 151 F. 2d 180 13

Garcia Sugars Corp. v. New York Coffee & Sugar Exchange, Inc. (1938), 7 N. Y. S. 2d 532 ..... 7, 9

McCampbell v. Warrich Corporation (1940), 109 F. 2d 115 13

Rice v. Chicago Board of Trade (1947), 331 U. S. 247 . 6

Thomson v. Thomson (1925), 315 Ill. 521, 146 N. E. 451 ..... 6, 7, 9

United States v. Masonite Corp. (1942), 316 U. S. 265. 10

United States v. New York Coffee & Sugar Exchange, Inc. (1924), 263 U. S. 611 ..... 7, 14

United States v. Socony-Vacuum Oil Co. (1940), 310 U. S. 150 10

United States v. Trenton Potteries Co. (1927), 273 U. S. 392 10

United States v. South-Eastern Underwriters Assn. (1944), 322 U. S. 533 11

STATUTES.

Commodity Exchange Act, 7 U. S. C., Sec. 1-17(b) 2, 6, 12, 14, 15

Sherman Act, 15 U. S. C., Sec. 1-7 13

Federal Rules of Civil Procedure, Rule 9(b)..... 12

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 685

RAYMOND A. BELZ,

Petitioner,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, et al.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

OPINIONS BELOW.

This is a suit for treble damages under the anti-trust laws and for a declaratory judgment (R. 2-4). The District Court dismissed the Amended Complaint on the ground that it failed to state a claim upon which relief could be granted (R. 16). The Circuit Court of Appeals for the Seventh Circuit in a unanimous decision affirmed the judgment (R. 16, 35). The opinion of the District Court is unreported (R. 13-15). That of the Circuit Court of Appeals is reported in 164 F. 2d 824 (R. 13-15, 34).

Both the District Court and the Circuit Court of Appeals rested their judgments on the authority of their respective

decisions in the case of *Cargill, Incorporated* v. *The Board of Trade of the City of Chicago, et al.,* 164 F. 2d 820 (C. C. A. 7), which has been docketed in this Court in the present term as No. 671 (R. 13-15, 34).

STATEMENT.

The petitioner, Belz, like the petitioner in No. 671, challenges the validity of an emergency regulation of the Board of Trade of the City of Chicago, Regulation 1899, adopted by the respondent directors of the respondent Board of Trade on June 13, 1946, pursuant to the so-called emergency rule of the Board, Rule 251 (R. 2-7).[1]

Petitioner is a dealer in grain (R. 3-4). The respondents are the Board of Trade of the City of Chicago, its officers and directors (R. 2-3).[2] The Board of Trade conducts the organized grain exchange at Chicago, Illinois, and was designated a contract market under the provisions of the Commodity Exchange Act, 7 U. S. C., Sec. 7 (R. 3). On June 13, 1946, the petitioner, as assignee of the contract buyer, held a "futures" contract made by his assignor on the Chicago exchange for the purchase of 75,000 bushels of corn at $1.18½ per bushel to be delivered in September, 1946 (R. 4). This contract served as a "hedge" against a commitment for the sale of an equal quantity of "cash" corn (R. 4).

On June 13, 1946, the respondent directors of the Board of Trade, acting under the emergency rule, adopted Regulation 1899 of the Board (R. 4-6). In this Regulation, the

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[1]Unlike the petitioner in No. 671, the petitioner here challenges only one regulation of the Board, Regulation 1899.

[2]Petitioner has not included as parties defendant to this suit, the Board of Trade Clearing Corporation, its officers and managers, as was done in No. 671.

directors found that the unusually large exports of foodstuffs from this country for world famine needs had incapacitated the exchange from functioning as a free, open and orderly market in certain grains, and required the taking of action in the national public interest to meet the emergency (R. 5-6). Based on this finding, the directors closed futures trading in these grains for delivery in 1946 and early 1947, and ordered all outstanding contracts calling for such delivery to be settled without delivery and by monetary payments based upon the closing market quotations on June 13, 1946 (R. 6), which closing quotations were at the OPA ceilings. Rule 251 expressly empowered the board of directors of the Board of Trade "to close the Exchange or to stop trading * * * in any of the future contracts of any commodity, by reason of any emergency or otherwise, and to make such Regulations in regard to deliveries and settlement prices as it may deem proper because thereof." (R. 4).[3]

It is averred that as a result of the adoption and enforcement of Regulation 1899, petitioner's futures contract was terminated in accordance therewith, and petitioner was tendered a settlement price based upon the difference between the contract price of $1.18\frac{1}{2}$ per bushel and the closing market quotation for corn on June 13, 1946 of $1.46\frac{1}{2}$ per bushel (R. 6). Had Regulation 1899 not been adopted, the

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[3] Rule 251 also provided that "All Exchange contracts shall be subject to the exercise of such power." (R. 4). Although the Amended Complaint alleges that the emergency rule was unknown to the petitioner and his assignor (R. 4), the petitioner's assignor when he made the exchange contract tacitly agreed to be bound by all the rules, regulations and customs of the market. *Crowley* v. *Commodity Exchange*, 141 F. 2d 182, 188 (C. C. A. 2); *Daniel* v. *Board of Trade of the City of Chicago, et al.*, 164 F. 2d 815, 818 (C. C. A. 7). The petitioner, as assignee, stands in no better position. As a matter of fact, the petitioner does not contend in his petition that his ignorance or that of his assignor relative to the existence of Rule 251 immunized his exchange contract from the operation of Rule 251 and of regulations adopted thereunder.

petitioner would have benefited by the subsequent rise in the market price of corn (R. 10-11).[4] Petitioner computes his damages as amounting to $57,375 (R. 7).

The Amended Complaint charges that the respondent Board of Trade of the City of Chicago, its directors and officers, "on or before" June 13, 1946, "in furtherance of their own financial interests and in disregard of rights of buyers under grain futures contracts", unlawfully "combined, conspired, and agreed among themselves arbitrarily and unreasonably to fix, manipulate and control the price of, and to prevent dealing in, a substantial part of the grain futures contracts in interstate commerce" (R. 4-5). The adoption of Regulation 1899 by the board of directors of the Board of Trade on June 13, 1946 is alleged to constitute part of the charged combination, conspiracy, and agreement (R. 5). No other acts or conduct of the respondents are alleged in the Amended Complaint, or are charged, as being part of the combination, conspiracy and agreement.

In its opinion below, the Circuit Court of Appeals said (R. 34):

> "The allegations of the amended complaint parallel the allegations in *Cargill, Incorporated* v. *The Board of Trade of the City of Chicago, et al.*, 7 Cir. 164 F. 2d 820, this day decided, although in a more concise form. The averments of the plaintiff's amended complaint charge a violation of the Sherman Act, just as in the *Cargill* case. On the authority of that case, the judgment in this case is affirmed."

In the *Cargill* case, Regulation 1899 was sustained as a lawful exercise of emergency powers vested by Rule 251

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[4]The allegation in the Amended Complaint relative to the "market price" of corn after June 13, 1946 (R. 10-11), does not refer to any market price of futures on the Chicago exchange inasmuch as futures trading in corn on that exchange for the September, 1946 delivery (or for any other delivery in 1946) was ended on June 13, 1946, by Regulation 1899 (R. 6).

in the board of directors of the Board of Trade. The Circuit Court of Appeals there held that the acts of respondents in adopting and enforcing Regulation 1899 "rather than being in restraint of commerce, were in aid of commerce in facilitating future trading on the market", and came within "the rule of reason"; that the stoppage of trading in certain grain futures was not in restraint of trade; and that as an incident thereto the settlement of outstanding contracts in such futures on a monetary basis without delivery did not constitute "price fixing," but on the contrary constituted a method of settlement agreed upon by the parties under the emergency rule. (164 F. 2d 822, 823.)

ARGUMENT.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, BUT ACCORDS WITH THE DECISIONS OF THIS COURT, OF OTHER FEDERAL COURTS AND OF STATE COURTS.

None of the decisions of this Court with which the decision of the Circuit Court of Appeals below is said to be in conflict (*Pet.*, pp. 13-14, 21-26) dealt with the operation of an exchange, let alone its operation in an emergency. This case does not involve, as did the decisions cited in the petition, a combination or conspiracy by like business interests to restrain trade and competition by price-fixing or other means, or an attempt to monopolize a trade or business in interstate commerce. This case deals with the measures taken by a contract market to meet the emergency created by grain shortages and famine relief. The direct responsibility for such measures has always rested on the contract market and its governing board and not upon any governmental agency. *Thomson* v. *Thomson*, 315 Ill. 521, 530, 146 N. E. 451, 455; *Rice* v. *Chicago Board of Trade*, 331 U. S. 247, 250; 7 U. S. C., Sec. 7 (c) to (f).

Neither the design nor the effect of Regulation 1899 was to impose an unreasonable restraint upon trade in grain, or to fix the prices of grain sold in interstate commerce. The Regulation was an exercise of that inherent power, vested by necessity and convention in all contract markets

and their governing boards, to close futures trading in a commodity and provide a means for settling outstanding futures contracts, in order to resolve an emergency. *Thomson* v. *Thomson* (1925), 315 Ill. 521, 146 N. E. 451; *Crowley* v. *Commodity Exchange* (1944), 141 F. 2d 182, 185 (C. C. A. 2); *Daniel* v. *Board of Trade* (1947), 164 F. 2d 815, 819 (C. C. A. 7); *Garcia Sugars Corp.* v. *New York Coffee & Sugar Exchange, Inc.* (1938), 7 N. Y. S. 2d 532, 534 aff'd w.o.op. sub nom. *Rifkind* v. *New York Coffee & Sugar Exchange, Inc.,* 258 App. Div. 871, 16 N. Y. S. 2d 1023. An exchange is not required to remain immobile when confronted with an emergency which incapacitates it from continuing as a free, open and orderly market, whether the emergency results from a declaration of war, a governmental priority order promulgated during the war, the enforcement by the government of a commodity quota system, or the diversion by government action of unusually large quantities of grain from normal marketing channels for export overseas to meet a world food crisis. (*Ibid.*)

This Court long has recognized that the adoption and enforcement of rules and regulations necessary for the functioning of contract markets do not violate the anti-trust laws. *United States* v. *New York Coffee & Sugar Exchange, Inc.,* (1924) 263 U. S. 611, 619, 621; *Chicago Board of Trade* v. *United States,* (1918) 246 U. S. 231, 238.

In the *New York Coffee & Sugar Exchange* case, *supra,* the rules and regulations of that exchange which permitted the liquidation of futures contracts without delivery and by the setting off of purchases against sales through clearance by the affiliated Sugar Clearing Association, were assailed as violative of the anti-trust laws. This Court, in upholding the rules and regulations in question, said (263 U. S., pp. 619, 621):

"* * * the rules and organization of the Exchange

and Clearing Association are very like those of the Chicago Board of Trade and similiar Exchanges for the sales of commodities for future delivery.

* * * * * *

"The usefulness and legality of sales for future delivery, and of furnishing an Exchange where under well-defined limitations and rules the business can be carried on, have been fully recognized by this Court in *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 246. Those who have studied the economic effect of such Exchanges for contracts for future deliveries generally agree that they stabilize prices in the long run instead of promoting their fluctuation. * * * The machinery of such an Exchange has been at times made the means of promoting corners in the commodity dealt in by such manipulators and speculators, thereby restraining and obstructing foreign and interstate trade. In such instances, the manipulators subject themselves to prosecution and indictment under the Anti-Trust Act. *United States* v. *Patten*, 226 U. S. 525. But this is not to hold that such an Exchange with the facilities it affords for making contracts for future deliveries is itself a combination and conspiracy thus to restrain interstate and foreign trade.

* * * * * *

"The Government contends that the prayer of the petition is justified by the decision of this Court in the case of *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1. * * * But nothing in the case sustains the view that those promoting and operating such an Exchange are themselves imposing a burden or restraint upon interstate commerce for which they may be indicted under the Anti-Trust Act, or from continuing which they may be enjoined."

See also, *Chicago Board of Trade* v. *United States*, 246 U. S. 231, where the "Call Rule" of the Board of Trade was held not violative of the anti-trust laws.

A fortiori there is no violation of the anti-trust laws where the regulation of the exchange was aimed at resolv-

ing a national emergency which incapacitated the exchange from maintaining a free, open and orderly futures market.

As indicated hereinabove, Circuit Courts of Appeals have recognized, upon common law principles, the general powers of exchanges in an emergency to stop futures trading and to order the settlement of outstanding futures contracts. *Crowley* v. *Commodity Exchange,* 141 F. 2d 182, 185 (C. C. A. 2); *Daniel* v. *Board of Trade,* 164 F. 2d 815, 819 (C. C. A. 7). The courts in Illinois where the respondent Board of Trade is located and the courts of New York have accorded similar recognition. *Thomson* v. *Thomson,* 315 Ill. 521, 146 N. E. 451; *Garcia Sugars Corp.* v. *New York Coffee & Sugar Exchange, Inc.,* 7 N. Y. S. 2d 532, 534, aff'd w.o. op. 258 App. Div. 871, 16 N. Y. S. 2d 1023. It indeed would be anomalous for it now to be held that the exercise of such powers duly invoked, violated the Federal anti-trust laws.

A.

THAT PART OF REGULATION 1899 WHICH PROVIDED FOR THE TERMINATION AND SETTLEMENT OF EXISTING FUTURES CONTRACTS WITHOUT DELIVERY AND UPON A MONETARY BASIS, DID NOT CONSTITUTE PRICE-FIXING.

The petitioner states that that part of Regulation 1899 which ordered the termination and settlement of outstanding futures contracts upon a monetary basis as an incident to the stopping of trading in certain grains, must have had economic effects in the country upon dealings in cash grain, and, in turn, upon the prices of grain, and therefore the Regulation constituted "price-fixing" (*Pet.*, pp. 19-21). Whether or not such effects can be attributed to the monetary settlement of futures contracts, such settlement does

not constitute price-fixing, within the meaning of the anti-trust laws.[5]

That part of Regulation 1899 which provided for the termination and settlement of existing futures contracts upon a monetary basis at closing market quotations did not fix or set the price of grain to be purchased or sold on the exchange. It did not eliminate fact rs determinant of such price, or tamper with any price structure. The prices contained in the futures contracts which were the subject of Regulation 1899 had been determined openly and competitively on the floor of the exchange. The prices to be reached in trading in other futures not coming under this Regulation similiarly would continue to be determined openly and competitively. Nothing more was involved than the settlement of liabilities upon terminated contracts in a manner agreed upon by the parties themselves. All futures contracts on the Board of Trade contemplate delivery. But they also contemplate the exercise of the power to stop trading in an emergency and to order the outstanding contracts settled on a monetary basis without delivery. Both parties to every futures contract so agree. *Crowley* v. *Commodity Exchange*, 141 F. 2d 182, 188 (C. C. A. 2); *Daniel* v. *Board of Trade of the City of Chicago, et al.*, 164 F. 2d 815, 818 (C. C. A. 7).

There is no conflict between the decision below and those decisions of this Court cited by petitioner in which activities were condemned as price-fixing. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392; *United States* v.

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[5]On occasion throughout his petition (pp. 19-20, 23, 27), the petitioner disregards the specific facts which his Amended Complaint sets forth, and treats the case as one in which the general characterizations in the Amended Complaint as to fixing of prices, manipulation, and price control govern the disposition of this case. These characterizations of the pleader cannot change the legal effect of the particular facts well pleaded.

Masonite Corp., 316 U. S. 265 and *United States* v. *Underwriters' Assn.*, 322 U. S. 533. In these cases the unlawful activities consisted of the fixing or setting of the price at which a commodity was to be sold in interstate commerce or the concerted elimination of competitive factors affecting price. Here, Regulation 1899 was not aimed at the prices of grain to be purchased or sold *in futuro*: it dealt with contracts already made and their termination and settlement. The providing of a basis of settlement was incidental to and a necessary result of the closing of trading in certain futures. It was, in effect, merely the decision of an arbitrator (i. e., the governing board) authorized by the contracting parties to determine a basis for settlement of their rights in the event of an emergency.

B.

THE RESTRAINT OF TRADE, IF ANY, IMPOSED BY REGULATION 1899 WAS REASONABLE.

Petitioner by the use of descriptives, characterizes Regulation 1899 as an illegal interference with a "free market", and would disregard as "gloomy predictions" the emergency which gave rise to the adoption of that Regulation (*Pet.*, pp. 23-26). Nothing in the argument which petitioner presents or the cases which he cites justifies his observations. The national emergency dealt with in Regulation 1899 is there set forth in full (R. 5-6). The board of directors of the Board of Trade found that as a result of governmental programs for world famine relief and the consequent diversion of large quantities of grain from normal marketing channels in this country, the grain exchange at Chicago could not continue as a free, open and orderly market for futures trading in certain grains to be delivered in 1946

and early 1947 (R. 5). Having found that a proper market no longer existed in the specified futures and that deliveries were "impossible" (within the standards envisaged by the Commodity Exchange Act, 7 U. S. C., Sec. 1 *et seq.*), the board of directors performed their duty by closing trading in those futures and ordering a settlement of existing contracts, in accordance with Rule 251.

The provisions of Regulation 1899 imposed no unreasonable restraint upon trade in grain. The governing board of a contract market must, of necessity, have the power and authority in a great emergency to close trading in a future when conditions become such that a proper market no longer exists. As shown in the foregoing discussion, this procedure consistently has been sustained by federal and state courts. If the power to close or to restrict futures trading in an emergency were lacking, the governing board of a contract market would be powerless to prevent price manipulation, cornering of the market and other evils sought to be prevented by the Commodity Exchange Act. The adoption and enforcement of Regulation 1899 fall directly within the holding in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, which applied the "rule of reason" to the restraint involved.

Petitioner states that the Board of Trade and its governing board in adopting Regulation 1899 were acting for "their own financial interest" (*Pet.*, p. 25). He refers to an allegation of the Amended Complaint that "in furtherance of their own financial interests", the respondents "unlawfully combined, conspired, and agreed among themselves", etc. (R. 4). No circumstances are stated in the Amended Complaint, as required by Rule 9(b) of the Rules of Civil Procedure. Accordingly, this allegation is insuffi-

cient as a charge of fraud, whatever its supposed relevance.[6] *McCampbell* v. *Warrich Corporation*, 109 F. 2d 115, 119 (C. C. A. 7); *Davis* v. *State Bank of Woodstock*, 151 F. 2d 180, 182 (C. C. A. 7); cf. *Daniel* v. *Board of Trade*, 164 F. 2d 815, 820 (C. C. A. 7)

C.

THE ENFORCEMENT OF REGULATION 1899 WAS NOT A MONOPOLIZATION OF TRADE OR COMMERCE.

Petitioner contends that the adoption and enforcement of Regulation 1899 constituted the exercise of a power to monopolize, in violation of Section 2 of the Sherman Act, 15 U. S. C., Sec. 2, and, therefore, that the decision below conflicts with that in the *American Tobacco Company* case, 328 U. S. 781 (*Pet.*, p. 26).

That case has no application here. There, the "Big Three" in the cigarette industry, were convicted of a conspiracy to acquire and maintain in combination the power to exclude competitors from the industry, and their conviction was sustained under Section 2 of the Sherman Act. Here, neither the Board of Trade nor its board of directors in adopting Regulation 1899 was engaged in acquiring, maintaining, or exercising for itself a power to exclude competitors from the grain trade. The Regulation did not deal with "competitors", but with a market. Regulation 1899 was an exercise of an emergency power or authority, and its purpose was to resolve an emergency which prevented the Chicago grain exchange from continuing to operate as a free, open and orderly market.

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[6] It may be noted that a regulation adopted to meet an emergency may result "in furtherance" of the financial interests of some members of the board that adopted it, without vitiating the regulation for personal interest or fraud. *Crowley* v. *Commodity Exchange*, 141 F. 2d 182, 188 (C. C. A. 2). The same result would follow where such an emergency regulation is alleged to be invalid under the anti-trust laws.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THIS COURT.

This case involves only the exercise of the inherent power of a commodity exchange to close futures trading and order outstanding contracts settled on a monetary basis, without delivery, when emergency conditions are found to exist. It has been shown that the exercise of this power has been recognized and approved by the courts, both state and Federal, and is fully in accord with the decisions of this Court; and that the facts set forth in the pleadings demonstrate there is no price-fixing, monopolization, or unreasonable restraint of trade involved.

However, petitioner urges that Regulation 1899 violated Section 9 of the Commodity Exchange Act (7 U. S. C. A. 13), which makes it a crime for any person to "manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any board of trade", and says that this issue of liability presents an important question of federal law which has not been but should be decided by this Court (*Pet.*, pp. 14, 26, 27).

The question here raised is similar to that considered under the anti-trust laws in the *New York Coffee & Sugar Exchange* case, 263 U. S. 611, discussed above. In upholding the rules and regulations of an exchange as necessary for the carrying on of its business, the Court said (263 U. S., pp. 620-621):

> "The Government contends that the prayer of the petition is justified by the decision of this Court in the

case of *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1 [which sustained the Grain Futures Act, now known as the Commodity Exchange Act]. It has no application. We held there that Congress, having found that the sales of grain for future delivery on the Board of Trade were susceptible to speculation, manipulation and control affecting interstate consignments of grain, in such a way as to cause a direct burden on, and interference with, interstate commerce therein, had power to place such markets under federal supervision to prevent such abuses. But nothing in the case sustains the view that those promoting and operating such an Exchange are themselves imposing a burden or restraint upon interstate commerce for which they may be indicted under the Anti-Trust Act, or from continuing which they may be enjoined."

Regulation 1899 was adopted to meet an emergency which had destroyed the free market in certain grain futures. It thus was in harmony with the policy and standards envisaged by the Commodity Exchange Act. In *Cargill* v. *Board of Trade of the City of Chicago*, CEA Docket No. 6,[7] the Commodity Exchange Commission sustained under Section 5 (d) of the Commodity Exchange Act, 7 U. S. C., Section 7(d), an emergency regulation of the Board of Trade which stopped trading in a future and ordered the settlement of existing contracts, as a means for resolving an emergency brought about by an attempt to run a corner.

Petitioner urges as another question worthy of determination by this Court, his contention that the decision below of the Circuit Court of Appeals sustaining the validity of Regulation 1899 constituted an unlawful delegation of legislative powers to the Board of Trade and its governing board (*Pet.*, p. 28). Manifestly, there is no

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[7] A copy of the findings and decision in this case duly certified by the Department of Agriculture has been lodged with the Clerk of this Court in No. 671.

attempt here to endow a private group with law-making functions. The power to adopt Regulation 1899 was not delegated to the Exchange by the legislative branch of government; the power to adopt it arose by agreement of all who trade on the Exchange to be bound by Rule 251 and all other rules and regulations adopted by the Board for the conduct of trade. Neither the anti-trust laws nor the Commodity Exchange Act forbids the adoption of necessary or reasonable rules for trading. It is obvious that in the absence of a Congressional prohibition, the adoption of Rule 251, and other necessary rules, is not an unconstitutional delegation of legislative authority.

Petitioner claims additionally that he is entitled to money damages, because his Amended Complaint contains the allegation, discussed hereinabove, that "in furtherance of their own financial interests" the respondents unlawfully combined, conspired, etc. For reasons previously stated, this is an insufficient allegation upon which to base a claim; for the facts well pleaded affirmatively show that petitioner is without a claim.

Petitioner states that he erroneously was denied a declaratory judgment (Pet., p. 30). His suit was for money damages—damages, if any, which already had accrued. If a good cause of action for money damages had been alleged, there would be no need or room for a declaratory judgment. If a good cause of action for money damages has not been stated, there is no ground for declaratory judgment. See *Blackman* v. *Stone,* 101 F. 2d 500, 505 (C. C. A. 7). The judgment below amply declared the petitioner's rights.

CONCLUSION.

No grounds appear which warrant the granting of the writ in this case. Although petitioner has attacked the decision below on many points, the Circuit Court of Appeals did not depart from the applicable decisions of this Court, and its holding finds support in the decisions of other state and federal courts. There is involved no unsettled principle of law having wide application. There is no important question requiring a definitive expression here.

Since the facts upon which the petitioner bases his claim disclose affirmatively the non-existence of any claim for relief, the cause was properly adjudicated below on the pleadings.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 685

RAYMOND A. BELZ,

Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, HARRY C. SCHAACK, RICHARD F. UHLMANN, J. O. McCLINTOCK, EARLE M. COMBS, JR., G. WILLARD HALES, SYLVESTER J. MEYERS, FRANK A. MILLER, THOMAS E. HOSTY, CARL E. BOSTROM, J. ELMER, JOHN S. MORRIS, GEORGE W. ALTORFER, ALBERT C. FISCHER, HOMER P. HARGRAVE, JOHN R. MURRAY and LEE H. WAGNER,

Respondents.

PETITION FOR REHEARING ON DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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Respondents.

PETITION FOR REHEARING ON DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Raymond A. Belz, petitioner, by his attorneys, prays that this Court grant a Rehearing on the order of April 26, 1948, denying his petition for writ of certiorari to review

the judgment of the United States Circuit Court of Appeals for the Seventh Circuit.

In accordance with Rule 33 of this Court, petitioner represents as follows:

I.

Subsequent Intervening Circumstances.

1. Denial of certiorari in the instant case cannot be reconciled with the decisions or reasoning in the movie anti-trust opinions filed by this Court *subsequent* to April 26, 1948.

On May 3, 1948, this Court decided and filed opinions in three anti-trust movie cases: (1) *United States* v. *Griffith* (No. 64, Oct. Term 1947, 16 L. W. 4386); (2) *Schine Chain Theatres* v. *United States,* (No. 10, Oct. Term 1947, 16 L. W. 4402); and (3) *United States* v. *Paramount Pictures, etc.* (No. 79-86, inclusive, Oct. Term 1947) 16 L. W. 4389.

It is not a function of a petition for rehearing on denial of certiorari nor would it be proper under Rule 33 for petitioner to argue in detail the applicability of the three decisions or their reasoning to the facts in the instant case. But can it be reasonably doubted that the reasoning in these three cases as to what constitutes a violation of the anti-monopoly provisions of the Sherman Act squarely applies to the exercise by the Chicago Board of Trade of its monopoly characteristics in the instant case?

The "monopoly power" of the Chicago Board of Trade over dealings in grain futures contracts is not controverted. See our petition for certiorari at pages 26, 14 and 16.

Under Regulation 1899 the directors of the Chicago Board of Trade were exercising that monopoly power in

a manner *they* deemed economically desirable. *One* of the results of this exercise of monopoly power was to "prevent dealing in a substantial part of the grain futures contracts in interstate commerce, including petitioner's futures contract, all of which was in unreasonable restraint of interstate trade in commerce" (R. 5). It is suggested that this conduct was condemned by this Court as a violation of the Sherman Act in *United States* v. *Griffith*, when this Court said:

> "The anti-trust laws are as much violated by the prevention of competition as by its destruction. . . . It follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." (16 L. W. at 4388.)

See also *United States* v. *Paramount*, 16 L. W. at 4399, and *Schine Theatre* v. *United States*, 16 L. W. at 4407.

The monopoly power of the Board was exercisable without restraint under Rule 251 which permitted the Board to make any Regulation concerning "settlement prices" as it deemed proper (R. 5).

The Chicago Board of Trade was exercising and using its monopoly power to foreclose competition—and this *per se* constituted a violation of the Sherman Act.

It is respectfully suggested that if the petition for certiorari in this case had been filed *subsequent* to the three opinions of May 3, 1948, this Court would not have denied certiorari. These Anti-Trust decisions reaffirm judicial recognition of the charter of economic liberty afforded the "small businessman" by the Sherman Act. The ruling of the Circuit Court of Appeals permits the Chicago Board of Trade to be exempted from this charter insofar as the small grain dealer is concerned.

2. The decision in *Anderson* v. *Atchison, Topeka & Santa Fe* (April 26, 1948 No. 620, Oct. Term, 1947, 16 L. W. 4375) concerning the requirements of pleading a cause of action cannot be reconciled with the decision denying certiorari.

Petitioner respectfully suggests that the allegations in the present complaint concerning conspiracy to fix, manipulate and control prices, and to prevent dealing in grain futures contracts (R. 4-5) is at least as detailed and specific as the complaint in the *Anderson* case, based upon the duty of the employer "to furnish a safe place to work."

II.

Substantial Ground Not Previously Presented.

1. Petitioner, suing as a private litigant under the Sherman Act, is, nevertheless, acting in the general public interest.

The petition for certiorari failed to suggest to the Court that, notwithstanding petitioner's status as a private litigant, he nevertheless was acting in the public interest.

The decisions construing the provisions of the Anti-Trust Laws providing for civil actions for damages by individuals (15 U. S. C. 15) recognize that the civil action for damages possesses *some* of the characteristics of a suit by the Government of the United States for violations of the Anti-Trust Laws.

Quemos Theatre Co. v. *Warner Bros.*, 35 F. Supp. 949, 950 (D. C., N. J., 1940).

Weinberg v. *Sinclair Refining*, 48 F. Supp. 203, 205 (D. C., N. Y., 1942).

Glenn Coal v. *Dickinson Fuel*, 72 F. 2d. 885, 889.

Maltz v. *Sax*, 134 F. 2d. 2, 4 (C. C. A. 7, 1934).
White Bear Corp. v. *State Theatre Corp.*, 129 F. 2d. 600, 604 (C. C. A. 6, 1942).

The anti-trust opinions of May 3, 1948 all involved actions by the United States Government. The petition for certiorari in the instant case should be considered in the light of this principle that the national importance of the civil action for damages is in part at least, the same as is an action by the Government of the United States for violation of the anti-trust laws. Furthermore Regulation 1899 (R. 6-7) was not passed under Government direction. And even if it had been that would not constitute a defense. (*U. S.* v. *Socony Vacuum Oil*, 310 U. S. 150 at 227 (1939).)

2. The reasons for denial of certiorari relied on by respondents do not justify denial of certiorari.

Denial of certiorari leaves counsel without knowledge as to the specific grounds therefor. Notwithstanding counsel's recognition of the heavy burden cast on this Court by petitions for rehearing in the discretionary jurisdiction, *i. e.* certiorari, cases, it is nevertheless the solemn obligation of a member of the Bar of this Court to express his views where he believes the Court has erred in a matter of national importance.

Petitioner respectfully suggests that respondents' brief either expressly or impliedly relied in great part on four separate grounds as basis for denial of certiorari. Petitioner further suggests that *these* four grounds did *not* grapple with the essential problems under the anti-trust laws or under the Commodity Exchange Act. In essence these four grounds *avoided* the precise questions presented by the petition for certiorari. These grounds in substance were that the rules of the Chicago Board of Trade should

be sustained, because: first, as a matter of business practicality; second, that if they were not sustained, a "parade of horrible consequences" resembling the effect of the "portal-to-portal" decision of this Court would necessarily follow; third, that "Cargill was gambling"; and, fourth, that the matter involving the Chicago Board of Trade was not of national importance. The fallacies and defects of these lines of reasoning is immediately evident, and needs only a statement to expose their weaknesses. These arguments strongly resemble similar arguments made—and rejected by this Court—in the movie anti-trust decisions of May 3, 1948.

Conclusion.

Petitioner respectfully suggests that if under the movie anti-trust cases a conspiracy by producers-distributors *aimed* at monopoly was illegal, then the actual monopoly power of the Chicago Board of Trade of the grain futures market and the exercise of such power by elimination of futures trading in grains and by fixing the prices of such futures contracts was even more clearly a violation of the Sherman Act. If the agreements by the eight national distributors in the movie industry served to violate the provisions of the Anti-Trust laws, then the buying, control and manipulation of prices by the Chicago Board of Trade—affecting 90% of all the grain futures contracts—was even more clearly illegal.

The denial of certiorari in the instant case means that the country grain dealer or trader no longer has any substantial protections when he makes a contract of hedging. The Chicago Board of Trade is now free to exercise supreme and unlimited monopoly power to determine and

affect the prices of grain futures contracts as its Board of Directors see fit to do.

Respectfully submitted,

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Petitioner,

By Abraham W. Brussell
.....

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Certificate.

Abraham W. Brussell, in accordance with Rule 33 of this Court, certifies that he is a member of the Bar of this Court; that he has caused to be prepared the foregoing petition for rehearing, and states that this petition for rehearing is presented in good faith and not for delay. He further certifies that this petition for rehearing, in his opinion, is confined to intervening circumstances of substantial or controlling effect and to a substantial ground available to petitioner although not previously presented in the petition for certiorari.

Abraham W. Brussell
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ABRAHAM W. BRUSSELL.

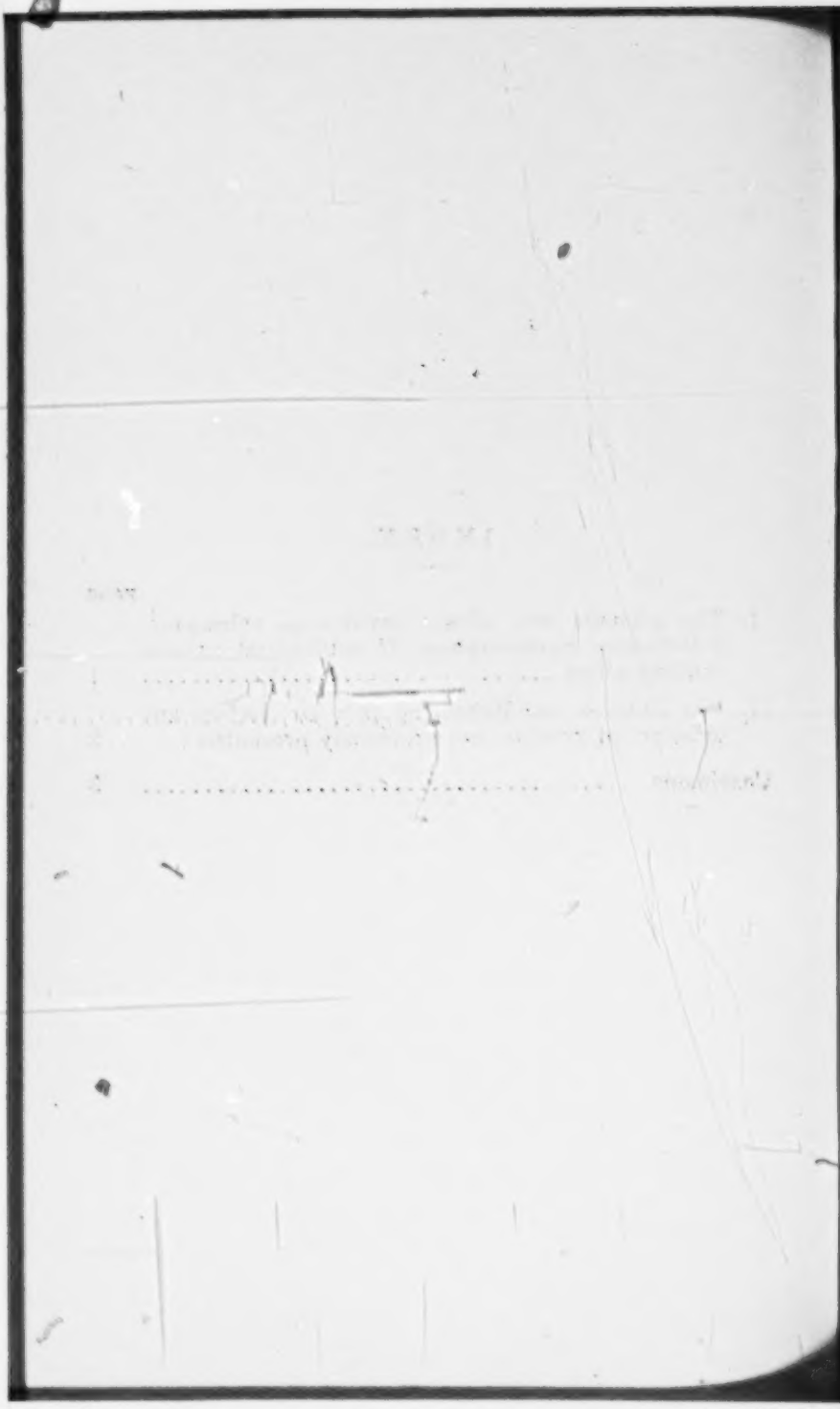
INDEX.

PAGE

I. The grounds now alleged involve no subsequent intervening circumstances of substantial or controlling effect 1

II. The Petition for Rehearing fails to disclose any substantial grounds not previously presented 2

Conclusion 3



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 685

RAYMOND A. BELZ,

Petitioner,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, et al.,

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR REHEARING ON DENIAL OF PETITION FOR WRIT OF CERTIORARI.

The Petition for Rehearing of the order on denial of the Petition for a Writ of Certiorari discloses neither grounds which are confined to intervening circumstances of substantial or controlling effect nor other substantial grounds available to petitioner not previously presented.

I.

The grounds now alleged involve no subsequent intervening circumstances of substantial or controlling effect.

The Petition for Rehearing (p. 2) refers to the opinions of this Court in three cases involving the motion picture industry handed down on May 3, 1948, as subsequent inter-

vening circumstances of substantial or controlling effect. These cases do not have any pertinency. The Court having heard arguments in these three cases undoubtedly had them in mind at the time of the denial of the Petition for a Writ of Certiorari in this case. The three cases cited by petitioner involve the monopolistic control which the defendants in those cases had acquired in the motion picture industry. As pointed out in the respondents' brief in opposition to the Petition for a Writ of Certiorari, Regulation 1899 of the Board of Trade did not deal with the exclusion of competitors but with the functioning of a contract market. Regulation 1899 was the exercise of an emergency power vested in the Directors of the Board of Trade; the purpose of its adoption was to resolve an emergency which had prevented the grain exchange from continuing to operate as a free, open and orderly market.

Petitioner also argues that he has met the requirements of pleading and cites the case of *Anderson* v. *Atchison Topeka & Santa Fe* (No. 620, October Term 1947, decided April 26, 1948) as a controlling subsequent intervening circumstance. This case has no relevancy. It merely decided that the complaint in that case seeking damages for wrongful death was sufficient to state a cause of action under the law of California. In addition, the same argument was advanced in the Petition for a Writ of Certiorari at page 29.

II.

The Petition for Rehearing fails to disclose any substantial grounds not previously presented.

Petitioner in this section of his Petition for Rehearing purports to set forth two additional substantial grounds: (1) that the Petition for a Writ of Certiorari failed to

suggest to the Court that notwithstanding petitioner's private status as a private litigant he nevertheless was acting in the public interest. This is not a new ground (see Pet., pp. 15, 16). (2) That the reasons for denial of certiorari relied upon by respondents in their brief in opposition to the Petition for a Writ of Certiorari do not justify denial of certiorari. It is obvious that this ground involves matters considered by the Court in denying the Petition for a Writ of Certiorari.

Conclusion.

We respectfully submit that the Petition for Rehearing should be denied.

Respectfully submitted,

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